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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue:

1. Wilkinson v State of New South Wales [2020] NSWWCCPD 52
2. Woolworths Ltd v Galea [2020] NSWWCCPD 53
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WCC – Presidential Decisions

Section 11A WCA – reasonable action with respect to discipline of a worker

Wilkinson v State of New South Wales [2020] NSWWCCPD 52 – Deputy President Wood – 13/08/2020

The appellant commenced work with NSW Police Force as a civilian Crime Scene Officer in in January 2015, at Broken Hill. However, in about September 2015, her marriage broke down and there were long standing custody issues regarding her daughter after this.

On 23/01/2019, the appellant's husband attended Broken Hill Police Station and applied for an ADVO against her. The appellant was served with that application and was directed to attend Broken Hill Local Court on 15/02/2019.

On 29/01/2019, the respondent issued an Interim Risk Management Plan, which restricted the appellant from handling firearms and being involved in matters where firearms were present.

On 13/02/2019, the respondent handed the appellant a letter dated 7/02/2019, which contained a number of allegations of alleged misconduct. She ceased work on 15/02/2019 and alleged that she suffered a psychological injury as a result of 2 of the allegations, which she alleged were incorrect. She had previously suffered a non-work related psychological condition. She claimed compensation, but the respondent disputed the claim under ss 4, 9A and 11A *WCA.*

On 17/02/2020, ***Arbitrator Homan*** issued a COD, which determined that receipt of the respondent's letter alleging misconduct and its subsequent investigation were the main contributing factors to the aggravation or exacerbation of the appellant's psychological condition, but the injury was caused by reasonable action taken or proposed by the respondent with respect to discipline.

Deputy President Wood noted that the appellant appealed on 12 grounds and that she alleged errors of law and mixed errors of fact and law.

Wood DP first considered ground 11, which alleged a mixed error of fact and law in finding that the injury resulted from the letter alleging misconduct and the subsequent investigation when there was no evidence that the subsequent investigation caused the injury. She upheld this ground and noted that the respondent did not adduce medical evidence on causation and that its submissions at arbitration were of little assistance in identifying what actions taken with respect to discipline were said to be reasonable. Even if the respondent relied upon its actions after 7/02/2019, there was no factual or medical evidence to support the notion that they caused the injury. She stated:

> 58. The Arbitrator based her conclusion that the respondent suffered injury as a result of receiving the letter of allegations and the subsequent investigations on the opinion of Dr Mateo. Dr Mateo's evidence was that the appellant suffered injury following receipt of the letter of allegation and on her return to work on 15 February 2019 when she suffered panic attacks. Dr Mateo's evidence is not supportive of the conclusion reached by the Arbitrator that the psychological injury was in any part caused by the subsequent investigations. That proposition was not squarely raised before the Arbitrator by either party, not supported by any medical evidence and there was no other basis upon which it was open to the Arbitrator to form that view.

Wood DP upheld ground 1, which alleged that the Arbitrator applied the wrong test in evaluating whether the s 11A defence was available to the respondent and stated:

> 71. The cause of the appellant's psychological injury was the respondent's action in making two unfounded allegations in relation to the appellant's conduct. The question for the Arbitrator to determine was whether the making of those allegations was reasonable. The question was not whether the issue of the letter of allegations generally, which otherwise were not causative of the injury, was reasonable action taken by the respondent. Nor was it the implementation of the Interim Risk Management Plan, the restrictions placed on the appellant with respect to firearms, or the process of the subsequent investigations.
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> 72. Applying the principles set out in *Heggie*, where the psychological injury is wholly or predominantly caused by the respondent's disciplinary action, it is the reasonableness of that action that must be assessed. As referred to above, the principles enunciated by Sackville AJA in *Heggie* included the following observation:
>
> > Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury. (emphasis in original)
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> 73. The assessment of reasonableness should take into account the rights of the appellant and the objectives of the respondent, and whether an action is reasonable should, in all the circumstances, be addressed by a question of fairness, as observed by Geraghty CCJ in *Irwin*.

74. Again applying the observations of Sackville AJA in *Heggie*, the reasonableness of the respondent's actions should be assessed "*by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care*."

75. It is apparent that, despite having referred to and quoted the principles in *Irwin* and *Heggie*, the Arbitrator's reasoning process fell short of those considerations. I accept that the Arbitrator erred by failing to apply the principles enunciated in the above authorities in her assessment of whether the respondent's actions were reasonable. The absence of malice and/or negligence, and whether the respondent's actions were careless or involved a deliberate intention, are matters that are not determinative of the question of reasonableness. The Arbitrator did not turn her mind to the rights of the appellant or to questions of fairness. Nor did she look to the knowledge the respondent could have obtained had the respondent made reasonable inquiries or exercised reasonable care. Insofar as the Arbitrator took into account the respondent's actions in putting in place the Interim Risk Management Plan and the subsequent investigations, her consideration went beyond the actions that were causative of the injury, contrary to the principle enunciated in *Heggie*. Having failed to apply the correct test, the Arbitrator's conclusion that the respondent's actions were reasonable is an error of law and is revoked.

Wood DP did not find it necessary to consider the remaining grounds of appeal. She revoked the COD and determined the issue of "*reasonable action*" under s 11A *WCA,* as follows:

79. It is apparent that the application for an ADVO formed the basis upon which the letter of allegations was made. The respondent submits that all the respondent knew at the relevant time was that an application for an ADVO had been made which contained serious allegations. It is not contested by the respondent that the allegation that the appellant (or someone on her behalf) had broken into Mr Wilkinson's house was not an allegation made in the application for the ADVO. It is also not contested that an interim ADVO had not been served on the appellant. Both of those allegations were serious in nature, with serious consequences for the appellant if proved.

80. I accept that, had such allegations been made, it would have been incumbent upon the respondent to investigate them and the manner adopted by the respondent would have been appropriate. However, as Sackville AJA observed in *Heggie*, the reasonableness of an employer's action is to be determined by the facts known to the employer or which could have been known, following reasonably diligent inquiries. That takes into account the relevant information that the person could have obtained had the respondent made reasonable inquiries or exercised reasonable care. It is not enough that the respondent might have acted in good faith, or that the respondent thought it had an obligation to act as it did.

81. In the circumstances of this case, the respondent's action in making the two allegations was not undertaken following diligent inquiries or with reasonable care. There was no factual basis contained in the application for the ADVO for making the unfounded allegations. In the absence of a factual basis for doing so, the respondent's objective to investigate those two purported allegations was misplaced. Adopting the notion of "*fairness*" referred to by Geraghty CCJ in *Irwin*, it was not fair to the appellant that the respondent asserted that those very serious allegations had been made when, had reasonable care been taken, it would have been apparent that they had not.

Wood DP found that the respondent's actions in making those allegations was not reasonable action with respect to discipline and that its defence under s 11A (1) *WCA* was not made out. Accordingly, she found for the worker with respect to injury and remitted the matter to a different arbitrator to determine the claims for weekly payments and s 60 expenses.

Causation – Application of EMI (Australia) Ltd v Bes [1970] 2 NSWR 238 and Tudor Capital Australia Pty Limited v Christensen [2017] NSWCA 260

Woolworths Ltd v Galea [2020] NSWWCCPD 53 – Deputy President Snell – 19/08/2020

The worker was employed by the appellant as a part-time picker and packer and forklift driver. On 27/06/2017, the worker suffered a fractured left scaphoid in a fall at work and underwent surgery (open reduction & internal fixation) on 26/07/2017.

The worker alleged that following her injury, she had difficulty performing tasks and caring for her disabled son became difficult and it was a very stressful time. One week after the surgery, she developed a rash over the legs, back and buttocks and was diagnosed with "*lichen planus*". This was treated and cleared up with time, but she was left with altered pigmentation where the rash had been. She resumed pre-injury duties in June 2018.

The worker claimed compensation under s 66 *WCA* based upon an assessment from Dr Lai, who assessed 12% WPI, comprising 4% WPI for the left upper extremity and 8% WPI for scarring. However, the appellant disputed the claim based upon an opinion from Dr Curtin, that the skin condition was idiopathic and probably unrelated to the surgery. He assessed 2% WPI for the left upper extremity.

Arbitrator Wynyard conducted an arbitration by remote hearing and on 28/04/2020, he issued a COD in which he determined that the left hand injury was a material contribution to the consequential skin condition. He remitted the matter to the Registrar for referral to an AMS to determine permanent impairment of the left upper extremity and scarring.

The appellant appealed on 6 grounds as follows: (1) Error of law in finding that lichen planus was causally related to the accepted left hand injury; (2) Error of law by reversing the onus of proof; (3) Error of law by failing to provide it with procedural fairness by not dealing with its submissions; (4) Error of law and/or fact by failing to place adequate weight upon the opinions of Dr Curtin and Dr Abdulla; (5) Error of law and/or fact by failing to place little probative value upon the opinions of Dr Lai and Dr Lim; and (6) Error of law by making impermissible inferences regarding the worker's resumption of medication.

Deputy President Snell determined the appeal on the papers. He noted that as the Arbitrator's orders included a referral to an AMS, which were of an interlocutory nature, leave to appeal was required under s 352 (3A) *WIMA.* He granted leave on the basis that it was desirable for the proper and effective determination of the dispute that.

Snell DP considered grounds (1) and (2) together and upheld them. He stated:

> 38. The appellant's submissions proceed on the basis that the "*dispositive paragraphs*" of the reasons were those at [45] to [51]. That is the discussion of what the Arbitrator described as the "*medical question*". In considering the test applied by the Arbitrator, it is appropriate to have regard to the reasons at [43], which set out the Arbitrator's description of the test that he said was to be applied.
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> 39. The passage of *Seltsam* which the Arbitrator quoted included a well-known passage from the judgment of Herron CJ in *EMI Australia Ltd v Bes*. That passage included the statement that "*if medical science is prepared to say that it is a possible view, then, in my opinion, the judge after examining the lay evidence may decide that it is probable*". The Arbitrator approached the causation issue in light of the passage from *Bes* which was quoted. It is artificial to analyse the reasons on the basis that

the reasoning on causation is confined to the reasons at [45] to [51]. I accept the respondent's submission that the lay findings at [44] are also part of the dispositive reasoning. The findings regarding the lay evidence were relevant to the causation issue and the Arbitrator was entitled to have regard to them.

40. This does not conclude the question of whether the Arbitrator dealt correctly with the causation issue which was raised. The appellant relies on *Christensen*, in which McColl JA said that if the causal connection is possible, this "*open[s] the door to the temporal inquiry*", an inquiry that "*could not be undertaken in isolation from the medical evidence*". The appellant also refers to the Presidential decision in *Cruceanu* (see [27] to [28] above). The appellant submits the Arbitrator did not proceed in a fashion consistent with *Christensen* and *Cruceanu*.

41. The appellant's medical evidence allowed the possibility that there could be a causal connection between the conceded left hand injury and the condition of lichen planus. There were competing medical cases on the causation issue.

42. In *Christensen*, authorities regarding the sufficiency of proof on issues of causation (including *Bes*) were discussed at length. Dealing with the adequacy of an arbitrator's consideration of a causation issue it was said:

> The differences between the expert evidence were capable of being resolved rationally by examination and analysis. In my view, the Arbitrator's reasons demonstrate that he failed to undertake that exercise. He effectively rejected Professor Keogh's evidence on a demeanour basis, as the Deputy President found. Further, he failed to have regard to the significant aspects of Dr Rainer's evidence particularly regarding the possibility of viral myocarditis being missed as a function of sampling error which Dr Rainer said was '*highly unlikely*'. The Arbitrator's approach appears to have been that as long as something was a possibility, evidence to the contrary did not have to be considered. The Deputy President should have held that the Arbitrator's failure to analyse the competing theories of Mr Christensen's death by reference to all the medical evidence demonstrated a failure to give adequate reasons and constituted an error of law.

43. The temporal inquiry could not be undertaken in isolation from the medical evidence (see [27] above). The Arbitrator was required, in the circumstances, to seek to resolve the medical conflict by way of rational analysis. Grounds Nos. 3, 4 and 5, which deal with the Arbitrator's treatment of the medical evidence, are considered below. For reasons which appear below, the approach taken by the Arbitrator did not adequately deal with the medical evidence and was inconsistent with the decision in *Christensen*. As a consequence, Grounds Nos 1 and 2 succeed.

Snell DP next considered ground (6) and upheld it. He stated:

48. In *Bradshaw v McEwans Pty Ltd*, the High Court said:

> In questions of this sort where direct proof is not available it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture (see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf per Lord Loreburn, above, at 678.

49. The above passage from Bradshaw was described as "*the test to be applied*" in *Luxton v Vines*. In *Flounders v Millar* Ipp JA said:

> It remains necessary for a plaintiff, relying on circumstantial evidence, to prove that the circumstances raise the more probable inference in favour of what is alleged. The circumstances must do more than give rise to conflicting inferences of an equal degree of probability or plausibility. The choice between conflicting inferences must be more than a matter of conjecture.

50. An attack on the availability of an inference drawn by an arbitrator, in an appeal pursuant to s 352 of *the 1998 Act*, is subject to the principles discussed at [12] to [16] above. It is insufficient that I would have drawn a different inference. It must be shown that the Arbitrator was wrong.

Snell DP held that the Arbitrator's inference that Dr Lim would have been made aware of the treatment being administered by Dr Hamsi before he took over her care was conjecture and it was not reasonably open to him on the evidence.

Snell DP considered grounds (2), (3) and (4) together and upheld them. He stated, relevantly:

69. There were multiple issues relevant to resolution of the medical dispute in the matter, including issues associated with the lay evidence. The Arbitrator made factual findings set out at [20] above. The Arbitrator's summation of the medical opinions appears at [18] above. The Arbitrator's resolution of the medical issues appears in the reasons at [45] to [51]. He referred to Bes. He noted the opinions of Dr Abdulla and Dr Curtin and said that these doctors did not "*deny that such a connection is impossible [sic, possible]*". He noted the opinions of Dr Lai and Dr Lim. The Arbitrator made an ultimate finding of fact:

> It follows that I am satisfied that the [respondent] has satisfied her onus. Mr Parker appeared to suggest that there were so many possible causes thrown up, that I would not be able to determine which had been actually been responsible for the onset. On the contrary, there are so many causes that they may all be partly responsible. I am not required to point to any one in particular. The question as to whether the surgery was a material contribution to the onset of [the respondent's] Lichen Planus has accordingly been answered in the affirmative.

70. The appellant's attack on the expert qualifications of the respondent's medical witnesses and their specialist expertise was not dealt with. The appellant's argument, that the reports of Dr Abdulla and Dr Curtin were, because of their expertise, entitled to greater weight than those of Dr Lai and Dr Lim, was not dealt with. The finding that the factual basis of the assumptions underlying the respondent's medical case (stress and malnourishment) was established, was based on a bare finding without reference to specific evidence. The Arbitrator found that "*pain medications such as post-operative non-steroidal anti-inflammatory drugs*" were consumed prior to the onset of lichen planus. This was based on an inference described at [50] of the reasons, together with the inferences described at subparas (d) and (e) of the reasons at [44]. The availability of these inferences is discussed above in the consideration of Ground No. 6. I have concluded the inference drawn relating to the ingestion of medication, whilst the respondent was under the care of Dr Hamsi, was erroneous.

71. The Arbitrator did not "*enter into the issues canvassed*" so as to explain why he preferred the respondent's medical case over that of the appellant. The approach taken to the expert evidence was inconsistent with that required consistent with *Christensen* (see the passage quoted at [42] above). Having found that *Bes* had application, it remained, in the circumstances of the case, necessary that the Arbitrator deal with causation, and the parties' medical cases, in a way consistent with the decision in *Christensen*. This did not occur and constitutes error. The approach taken by the Arbitrator was consistent with the summation by the appellant set out at [59] above. This had the effect that, having concluded the appellant's medical case did not exclude causation as a possibility, the Arbitrator then inverted the onus in how he assessed the parties' medical cases.

Accordingly, Snell DP revoked the COD and remitted the matter to a different arbitrator for redetermination.

WCC – Medical Appeal Panel Decisions

MAC revoked – AMS erred by finding that MMI had been reached when the finding was not available on the evidence

Queensland Property Investments Pty Ltd v De Paz [2020] NSWWCCMA 129 – Arbitrator Moore, Dr L Kossoff & Dr D Andrews – 3/08/2020

On 23/07/2020, the worker suffered a primary psychological injury.

On 19/05/2020, Dr Hong issued a MAC following an examination by video-link. He noted that the worker reported recurrent suicidal thoughts and said that he recently tried to commit suicide in his psychologist's office and the psychologist called the police. He was admitted to the psychiatric ward of Liverpool Hospital for one day. He diagnosed a chronic adjustment disorder and cannabis use disorder and assessed 22% WPI. He noted that Dr Rastogi assessed 15% WPI + 1% for treatment effects and Dr Bisht assessed 8% WPI.

The appellant appealed against the MAC under s 327 (3) (d) *WIMA* and argued that the AMS erred by finding that MMI had been reached and assessing WPI, when that finding was not available on the evidence. It argued that following the declinature of the claim under s 66 based upon Dr Bisht's report, the worker reacted very poorly to what he believed were inaccuracies and fabrications in that report, which led to a significant deterioration in his condition and affected the assessment of permanent impairment.

The MAP held that there was considerable weight in the appellant's argument that if the AMS paid proper regard to the recent deterioration he would have found MMI had not been attained and thus declined to make an assessment. It was clear that the receipt of Dr Bisht's report had a catastrophic impact on the worker and his response was a clear deviation from the normal fluctuations in symptoms in a person with his condition and it could almost be seen as a fresh injury.

The MAP held that the issue to be determined is whether MMI has been reached, but in a psychiatric injury case, symptoms must of necessity for the basis of any assessment. It found that there had been a significant deterioration in the worker's condition and held that it was satisfied that MMI had not been achieved. It suggested a re-examination 6 months after the date of the AMS' assessment.

Accordingly, the MAP revoked the MAC and concluded that a new MAC will issue following the further assessment..

Re-assessment required because AMS failed to measure contralateral shoulder – MAC revoked

State of New South Wales v Dumevska [2020] NSWWCCMA 131 – Arbitrator McDonald, Dr M Burns & Dr B Noll – 11/08/2020

On 6/09/1999, the worker injured her neck and right shoulder at work. On 31/12/2003, Campbell CJ awarded compensation under s 66 WCA for 11.25% permanent impairment of the neck and 7.5% permanent loss of efficient use of the right arm at or above the elbow.

In 2011, the worker commenced WCC proceedings and a MAC issued on 14/07/2011, which assessed 15% permanent impairment of the neck and 15% permanent loss of efficient use of the right arm at or above the elbow. A COD awarded her compensation under s 66 WCA for a further 3.75% permanent impairment of the neck and a further 7.5% permanent loss of efficient use of the right arm at or above the elbow.

In 2019, the worker commenced two further sets of WCC proceedings, seeking further compensation under s 66 WCA and an assessment of WPI for the purposes of s 39 *WCA.*

On 23/01/2020, Dr Hope issued a MAC, which assessed 15% permanent impairment of the neck and 15% permanent loss of efficient use of the right arm at or above the elbow and combined 16% WPI (7% WPI for the cervical spine and 10% WPI of the right upper extremity).

Both parties appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.*

The MAP determined that a further medical examination was required because the AMS failed to examine the contralateral shoulder and failed to record an adequate history to permit assessment under the Table of Disabilities. The MAP proposed a re-examination by video conference, but the parties objected and the examination was deferred until the Commission resumed face-to-face examinations.

The appellant argued that the AMS failed to apply a deductible under s 323 *WIMA* with respect to the cervical spine and that a 10% deduction was appropriate. It also argued that the AMS failed to correctly assess the right shoulder because he did not measure impairment of the left shoulder as required by paragraph 2.20 of the Guidelines. It argued that the assessment of 7% WPI for the left shoulder made by A/Prof Shatwell should have been adopted, resulting in an assessment of 7% WPI for the right shoulder and combined WPI of 14%.

However, the worker argued that the AMS did not err by failing to apply a deductible because there was no evidence that any degenerative changes contributed to the impairment. She also argued that it was not appropriate to accept A/Prof Shatwell's assessment of her shoulders because Dr Patrick found a full range of active movement in her left shoulder. She also argued that the AMS erred with respect to the Table of Disabilities assessments as he did not address subjective considerations.

The MAP held that the AMS was correct not to apply a deductible under s 323 *WIMA* to the assessment for the cervical spine as the available evidence indicated that the degenerative changes were asymptomatic before the injury in 1999. It also held that the AMS erred by not assessing the left shoulder as required by para 2.20 of the Guidelines. It adopted Dr Burns' assessment of 10% UEI for decreased active range of motion in the left shoulder and deducted this from the AMS' right shoulder assessment of 16% UEI, which converted to 6% WPI. It assessed combined WPI as 13%.

With respect to the Table of Disabilities assessments, the MAP accepted that the AMS' method of quantification was inappropriate. The MAP compared Dr Burns' findings to those of the AMS and assessed 20% permanent impairment of the neck and 20% permanent loss of efficient use of the right arm at or above the elbow.

Accordingly, the MAP revoked the MAC and issued a fresh MAC that assessed 13% WPI, 20% permanent impairment of the neck and 20% permanent loss of efficient use of the right arm at or above the elbow as a result of the 1999 injury.

WCC – Arbitrator Decisions

Section 11A WCA - Psychological injury wholly or predominantly caused by reasonable action taken or proposed with respect to discipline of a worker

Rabbas v Noni B Holdings Pty Ltd [2020] NSWWCC 265 – Arbitrator Toohey – 4/08/2020

The worker was employed by the respondent as a store manager. She alleged that she suffered a psychological injury as a result of bullying and harassment by her regional manager and 2 employees from mid-2018 until 10/12/2018 (when she ceased work).

The respondent did not dispute that the worker suffered a work-related psychological injury, but it disputed liability under s 11A *WCA*, on the basis that the injury was wholly or predominantly caused by reasonable action taken or proposed with respect to discipline.

The worker claimed continuing weekly payments from 6/05/2019 and lump sum compensation under s 66 *WCA*. However, she discontinued the weekly payments claim at the arbitration.

On 4/08/2020, ***Arbitrator Toohey*** issued a COD, which entered an award for the respondent. The Arbitrator's reasons are summarised below:

- The worker's statement of evidence focussed on the meeting with her regional manager on 19/09/2018 as the cause of her injury, starting with a conversation between them the previous week and the conduct and outcome of the meeting itself. There was no dispute that the process constituted "*discipline*" for the purposes of s 11A *WCA.*
- Dr Allan opined that the predominant cause of the injury were the allegations that were raised against the worker and the disciplinary actions that resulted. The Arbitrator was therefore satisfied that the injury was wholly or predominantly caused by the disciplinary process of the meeting on 19/09/2018.
- In *Irwin*, Geraghty CCJ stated:

  > …question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.

- In *Ivanisevic*, Truss CCJ stated:

  > In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected.

- In *Sinclair*, Spigelman CJ (with whom the other members of the Court of Appeal agreed) stated:

  > Furthermore, the case... primarily focused on the whole course of Departmental conduct as constituting the relevant 'substantial contributing factor' for purposes of s 9A. His Honour appeared to approach the s11A issue on the same basis. This is an appropriate course to adopt in a context concerned, and concerned only, with psychological injury arising from matters such as 'demotion, promotion, performance, appraisal, discipline,

retrenchment or dismissal'. Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.

His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation 'reasonable action with respect to discipline'. In my opinion, a course of conduct may still be 'reasonable action', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, 'reasonable action'.

- In *Heggie*, Sackville AJA stated that the following propositions are consistent with the statutory language and the Authorities that have construed s 11A (1):

  (i) A broad view is to be taken of the expression '*action with respect to discipline*'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation;

  (ii) Nonetheless, for s 11A (1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer;

  (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable;

  (iv) The of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline;

  (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury;

  (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances;

  (vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.

  His Honour stated:

  In my opinion, the better view is that the reasonableness of an employer's action for the purposes of s 11A (1) of the *WC Act* is to be determined by the facts that were known to the employer at the time or that could have been ascertained by reasonably diligent inquiries. The statutory language directs attention to whether the psychological injury was caused by reasonable disciplinary action taken or proposed to be taken by the employer. Ordinarily, the reasonableness of a person's actions is assessed by reference to the

circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A (1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline.

- The Arbitrator preferred the regional manager's evidence that she informed the worker that the disciplinary meeting would be formal and that she could have a support person attend. The fact that the worker had a support person attend indicates that she knew it was to be a formal meeting and that her manager was going to put matters that her staff had raised to her for a response.
- As the worker initiated the telephone call with the regional manager on 12/09/2018, in order to complain about her staff, the Arbitrator accepted that finding out that the staff had complained about her would have come as a shock to the worker, but she was not satisfied that the manager had spoken to the worker in an aggressive tone.
- It was reasonable for the regional manager to wait until the meeting to detail the allegations made by the staff as she told the worker who the complainants were and the worker had to work with them during the week leading up to the meeting. The manager was required to consider the impact on their working relationship with the worker if she detailed the allegations by phone. The evidence from the manager showed that she had received several lengthy emails from the staff about the worker's management of the store and how she treated them, including complaints from customers. These were not matters to outline informally by phone.
- It was reasonable for the regional manager to allow the worker's support person, who was a customer of the store, to remain during the meeting.
- While the worker alleged that the regional manager did not give her an opportunity to respond to the allegations and kept cutting her off, the manager stated that the worker had every opportunity to respond, but she kept going over and over the same things and she had to move the discussion forward. The handwritten notes of the meeting comprised 14 pages and detail the matters raised by the staff members and the dates of various incidents as well as the worker's responses. Based on that evidence, the Arbitrator was satisfied that the worker was given a reasonable opportunity to respond to the allegations.
- The meeting notes indicate that it lasted for about 3 hours, with three breaks of 10 minutes each. She rejected the worker's argument that the duration of the meeting proved that it was unreasonable.
- There is no dispute that the worker was not issued with a first and final warning at the meeting. The regional manager stated that this was in line with the respondent's policy and that a copy could be requested from HR. While the Arbitrator stated that an employer should ideally take active steps to provide a worker with a written copy of a warning, she was satisfied that a copy was available from HR and that the manager advised the worker of this. There was no evidence that the worker ever requested a copy of the warning and it was not clear what unfairness this caused the worker. Based upon the decision in *Sinclair*, this did not deprive the whole process of the characterisation of "*reasonable action with respect to discipline*".
- While the worker alleged that mediation was never offered, the meeting notes show an action plan to move forward and that mediation was offered and that the worker was happy with this. While mediation was not actually arranged, the worker was on leave until 4/12/2018 and the worker then went on sick leave from 11/12/2018.

- The worker did not challenge the accuracy of the regional manager's meeting notes per se. The Arbitrator did not accept the worker's arguments that they are self-serving and indicate that the manager had pre-judged the issues.
- The Summary of Formal Interview dated 19/12/2018, indicates that the manager told the worker to put any grievances regarding any team member in writing. The Arbitrator did not accept that the regional manager's overall approach was uncommunicative and not conciliatory. She gave the worker a week's notice of the meeting. She told her who the complainants were. She allowed a support person of the worker's choosing to attend the meeting and gave the worker a reasonable opportunity to be heard at the meeting. She was satisfied that she wanted the worker to improve and continue managing the store. She offered mediation with all team members and she found that the worker indicated she was happy with that suggestion.
- The Arbitrator rejected the respondent's argument that she should draw a *Jones v Dunkel* inference against the worker on the basis that there was no evidence from her support person.

Arbitrator reconsiders decision by a delegate of the Registrar that a section 66 dispute should be referred to an AMS because maximum medical improvement has been reached based upon medical evidence that the worker had a higher risk of contracting COVID-19 by attending the examination

Boland v DHL Global Forwarding (Australia) Pty Ltd – [2020] NSWWCC 272 – Arbitrator McDonald – 12/08/2020

On 26/06/2020, the respondent filed an application for reconsideration of a MAC dated 22/12/2017, on the basis that the degree of permanent impairment resulting from the injury on 3/11/2010 was fully ascertainable.

On 22/07/2020, a delegate of the Registrar granted the application and directed that the matter to be referred back to the same AMS.

On 5/08/2020, **Arbitrator McDonald** conducted a teleconference, during which the worker made an oral application for reconsideration of the delegate's decision, based on a note from his treating cardiologist, who recommended that he minimise his attendance at medical examinations during the COVID-19 pandemic. The worker objected to the in-person medical examination. The worker's solicitor also stated that an IME had been arranged on 18/08/2020, for the purposes of making a claim under s 66 *WCA* for all injuries.

The Arbitrator discussed the discretionary reconsideration power in s 350 (3) *WIMA* and set out the principles that apply to its exercise, which were summarised in *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 151 at [158] (citations omitted):

> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 2. whilst the word '*decision*' is not defined in section 350, it is defined for the purposes of section 352 to include "*an award, order, determination, ruling and direction*". In my view '*decision*' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schipp*');
>
> 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hilliger*');

5. …

6. …

7. …

8. … and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354(3) of *the 1998 Act*).

The Arbitrator held that factors numbered 5, 7 and 8 are not relevant to this matter and that factor no. 6 was based upon a repealed provision. She stated that the circumstances in which the Commission would reconsider a decision so recently made will be rare, but in the unusual circumstances of the pandemic, it is appropriate in this matter to avoid a multiplicity of medical examinations. She noted that the employer's solicitors had waited a year after the treating specialist considered that maximum medical improvement would have been reached to seek reconsideration of the MAC and stated:

14. It is common ground that since the date of the MAC in 2017, Mr Boland has been in receipt of weekly compensation under cl 28C of Schedule 8 of the *Workers Compensation Regulation* because maximum medical improvement had not been reached and the degree of permanent impairment was not presently ascertainable. If the 2017 MAC is not reconsidered he will remain on weekly compensation. Understandably, DHL's insurer seeks to limit the period for which the transitional provisions apply.

15. It is not mandatory that an AMS conduct an examination. Section 324 (1) (c) provides that the AMS may require the worker to submit to an examination. While it is possible that the AMS would determine that he could undertake an assessment on the papers or by video conference, I consider that is unlikely.

16. Even though the current request is only for a determination that the extent of permanent impairment is now ascertainable, the AMS will be required to conduct substantially the same examination as he would if he was assessing permanent impairment. In the 2017 MAC, the AMS set out the range of movement in Mr Boland's knees and observed the location of the tenderness of which he complained. The AMS measured reflexes. It is likely he would need to do that again.

17. If the AMS was to come to the decision that an examination is required, it is likely there would be a delay before the examination took place, during which time Mr Boland would remain on weekly compensation.

18. DHL accepts that Mr Boland suffered an injury to his right knee and a consequential condition in his left knee. An optional review response dated 30 November 2017 shows that Mr Boland has also claimed compensation for consequential conditions in his lumbar spine and left shoulder and that DHL has disputed liability for those claims on 16 August 2013, 8 May 2015 and 23 September 2016. Now that it is likely that his permanent impairment as a result of the injury has stabilised, his lawyer has arranged an examination for the assessment of his total permanent impairment.

19. It is likely that the examination on 18 August 2020 will result in a claim for permanent impairment compensation. If DHL's insurer maintains the stance with respect to consequential conditions, it is likely that the Commission will need to determine if the consequential conditions in the lumbar spine and left shoulder result from the injury in 2010. After that it is likely Mr Boland will need to be examined by an AMS for the purpose of the permanent impairment claim.

20. Mr Myles noted the inconsistency between Mr Boland attending an examination at the request of his lawyers but not attending an examination by the AMS. I agree that argument is open. However, I consider that the number of medical examinations should be limited in the current circumstances of the pandemic, particularly when it is likely that an AMS will need to conduct substantially the same examination after the permanent impairment claim is made.

21. The Commission is required to consider the public interest that litigation should not continue indefinitely and to do justice between the parties. Section 367 of the 1998 Act sets out the objectives of the Commission which include providing a fair and cost effective system for resolution of disputes, to reduce administrative costs across the workers compensation system and to provide a timely service to ensure entitlements are paid promptly.

22. Taking those matters into account, I consider that the appropriate course is to set aside the order that the matter be referred to the AMS.

23. However, in order to do justice between the parties an order should be made requiring Mr Boland to make his claim for compensation within a month of the date of the proposed examination. If the claim is not made DHL has liberty to apply by email for a telephone conference or determination on the papers, seeking to have the application referred to an AMS for a determination as to whether the degree of permanent impairment resulting from the injury on 3 November 2010 is fully ascertainable.

24. If the claim is made by 18 September 2020, the progress of the claim for permanent impairment compensation will rest with DHL's insurer. It is in the interests of both parties that it be dealt with promptly.

WCC – Registrar's Decisions

Work capacity dispute – meaning of suitable employment under s 32A WCA – hand injury caused 21% WPI – worker spoke no English, had little education and had only worked in cleaning and farm hand roles – award made under s 38 WCA

Singh v Cleaning Edge Solutions (NSW) Pty Ltd [2020] NSWWCCR 6 – Delegate McAdam – 12/08/2020

The worker was employed by the respondent as a cleaner and worked at the Baiada Chicken Factory. On 28/10/2016, while he was removing chicken scraps from a wing cutter machine, the machine unexpectedly turned on and caused significant injuries to his left hand, including the amputation of the middle finger, the partial amputation of the thumb and severe lacerations to his other fingers and hand. He also suffered a psychological injury.

The worker underwent surgery to reattach the severed finger and thumb and to repair the lacerations and he was off work for 3 months, after which he resumed suitable duties. However, suitable duties were withdrawn on 26/10/2017 and the worker's employment was termination.

On 23/04/2020, the insurer made a WCD and reduced weekly payments from $872 per week to $109.72 per week, on the basis that the worker had current capacity to work in suitable employment as a general farm hand/machine operator for 40 hours per week. The worker commenced proceedings in the Commission, which stayed the WCD.

Registrar's Delegate McAdam conducted a teleconference on 6/08/2020. The parties agreed on PIAWE ($1,090 per week) and the only dispute was the worker's capacity to work in suitable employment.

The Delegate noted that the worker obtained an assessment of 21% WPI from Dr Giblin and that the insurer accepted that assessment. Dr Giblin expressed the view that the worker's left hand is not of much use and that he was permanently unfit to use his left upper extremity for repetitive pushing, pulling, lifting, twisting, gripping impact activities or operating vibrating machinery.

The Delegate also noted that Dr Gertler, who psychiatrically assessed the worker at the request of his solicitors in 2018, diagnosed chronic PTSD associated with major depression as a result of the work accident and stated that the worker would never be fit to work around machinery.

A Vocational Assessment report dated 13/02/2020, indicated that a labour market analysis did not support the identified vocational options as the tasks that the worker has the physical capacity to perform and his English language skills are insufficient and he lacks the physical capacity to perform the tasks for which he has skills, aptitude and experience. It identified suitable employment as a commercial cleaner, tractor driver, farm hand and truck driver.

The treating GP was asked to comment on the vocational assessment report and he stated that the identified employment was suitable, but that the worker should not undertake orange picking. He issued certificates of capacity that indicated that the worker had capacity for suitable employment for 40 hours per week until 2/08/2020, with significant restrictions on pulling, pushing and lifting.

The worker argued that he is not fit to perform any of the jobs identified in the vocational capacity report. The respondent argued that it had complied with its statutory obligations in making the WCD and that the worker had not yet complied with s 38 (3A) *WCA.*

The Delegate noted that the accepted assessment of 21% WPI categorises the worker as a worker with high needs as defined in s 32A *WCA.*

In considering whether the identified jobs were suitable employment, and the opinion from the treating GP, the Delegate stated:

> 68. There appears to be no analysis or consideration provided by Dr Calaizis of the duties involved in the roles in comparison with the restrictions he has placed on Mr Singh when it comes to lifting, pulling and pushing. In a number of the roles, there is no consideration for Mr Singh's safety in performing the role. For example, in respect of the "commercial cleaner" role, the facsimile sent to Dr Calaizis indicates that climbing ladders will likely be frequent. I am not sure that with Mr Singh's restricted capacity, and his ongoing issues with grip strength in his left hand, it would be safe for him to climb a ladder, which would require stabilisation with his land hand whilst presumably performing duties with his uninjured right hand.

The Delegate held that while the worker does have some relevant transferrable skills, he questioned some of the skills identified in the vocational capacity assessment report, including communication skills and WHS knowledge. He was not satisfied that the employment identified in the WCD was suitable employment having regard to the factors outlined in s 32A *WCA.* He also rejected the insurer's argument that the worker was not entitled to weekly payments because he had not complied with s 38 (3A) *WCA*, as it had made voluntary payments after the end of the second entitlement period and he inferred that the worker asked that payments continue. In any event, the current application constituted a request to the insurer for weekly payments to continue. Alternatively, the worker is entitled to write to the insurer and request that weekly payments continue based upon the Delegate's decision.

Accordingly, the Delegate made an Interim Payment Direction that the respondent pay the worker $872 per week under s 38 *WCA.*